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Case 1:21-tv-00534-GBW-CJB Document 252 Filed 12/02/22 Page 2 of 23 PageID #: 7729

1 2 PROCEEDINGS 3 (REPORTER'S NOTE: The following pretrial hearing was 4 5 held in Courtroom 6-B, beginning at 3:00 p.m.) 6 THE COURT: Good afternoon. You may be seated. 7 All right. So we're here for the final pretrial 8 conference in BearBox LLC, et al versus Lancium LLC, et al. 9 Civil Action No. 21-534. 10 There's a three-day bench trial scheduled to start on Tuesday, December 6th at 9:00 a.m. 11 12 So I have reviewed the proposed pretrial order 13 submitted by the parties and I just want to go through 14 and -- go through the various sections and see what needs to be done and then decide on the motions in limine. 15 16 So let's start by having counsel put their 17 appearances on the record. 18 MR. MAYO: Good afternoon, Your Honor. 19 THE COURT: Good afternoon, Mr. Mayo. 20 MR. MAYO: Andrew Mayo from Ashby & Geddes on 21 behalf of plaintiffs BearBox and Mr. Austin Storms. 22 joined today by my co-counsel from Marshall Gerstein Ben 23 Horton and John Labbe. 24 MR. LABBE: Good afternoon.

MR. BURTON: Good afternoon, Your Honor.

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William Burton of Barnes & Thornburg on behalf of defendants. With me today is Mark Nelson, Adam Kaufmann and Derrick Hooker all from Barnes & Thornburg and all have been admitted pro hac.

Mr. Stover wanted me to let you know he's with Judge Fallon right now, but he does intend on joining us once that's over.

THE COURT: Okay.

So first with respect to trial exhibits and objections thereto, I see that the parties have separate list of exhibits. What I'd like the parties to do is to meet and confer and compile a joint -- a common list of exhibits in an attempt to reach agreement on any remaining objections.

The common list of exhibits should be filed no later than Friday, December 2nd, along with a list of any exhibits that remain in dispute. And for those that remain in dispute, I want the specific objections to the proposed exhibit with citations and any response to those objections with citations.

With respect -- you know, the purpose is to narrow the objections down as much as possible and to have -- it looks like many of the exhibits are the same, so instead of having plaintiffs and defendants, let's just have a common exhibit list.

And then to the extent that there are some exceptions where you guys just can't reach an agreement, then we can have them as, you know, Plaintiffs Exhibits and Defense Exhibits, but the record will be clearer with as many common exhibits as we can have.

Next with respect to demonstrative exhibits, any party proposing to use demonstrative exhibits during their examination of witnesses should produce the proposed demonstrative to the other side at least 24 hours in advance before its intended use and meet and confer about any proposed objections.

If the parties cannot reach agreement on demonstratives, it should be brought to the Court's attention for resolution prior to the start of the hearing on the proposed demonstratives to be used.

Next with respect to witnesses, are there any significant disputes with respect to the calling of any witnesses identified by either side that the Court needs to resolve?

In looking at the witness list, none was apparent to me.

MR. NELSON: Your Honor, there's one issue
that's come up, I don't think it's going to be a problem,
but Rachel Arndt is on the may call list for defendants. It
came to our attention last night that she is likely

unavailable. She lives in Chicago and her husband is out of town this time period when the trial is going to occur and she doesn't have anybody to watch her kids.

I think it's unlikely -- I brought this up to opposing counsel this morning. I think it's unlikely we will call her, given the current posture of the case, but she is amendable to appearing by Zoom or some other method in the event she were to be called if the Court would consider that.

THE COURT: Okay. If it is necessary to call her, she's on the may call list, so if it becomes an issue where you need to -- where defendants decide they want to call her, defendants should confer with counsel for plaintiffs to see whether they have any objection to her appearing remotely. And if you guys can't reach agreement on it, then I'll weigh in on it. Hopefully the parties will be able to reach agreement if necessary.

MR. NELSON: Thank you, Your Honor.

THE COURT: Any other issues with respect to witnesses?

MR. HORTON: Your Honor, we have designated in the pretrial order that we intend to call in our case-in-chief by deposition some limited deposition designations from two of the defendant's witnesses. We discussed that with counsel today during a meet and confer,

and counsel didn't have a position whether they were going to object or not to that. So we wanted to raise that as a potential issue as well.

THE COURT: Okay. So what's the issue with respect to deposition designations?

MR. NELSON: Well, Your Honor, we were -- we wanted some time to research the issue. It's my experience that some courts permit deposition designations to be played when the witnesses are also present live and other courts do not. And if plaintiff wants to call an adverse witness in their case-in-chief, then they call the person live. And I don't know what Your Honor's preference is at all, but we wanted to research the issue to make a decision.

THE COURT: Right. Did you intend to call these witnesses live as well?

MR. HORTON: No, Your Honor, just limited deposition testimony. The rule -- the rule on point, we think, on some point here, Your Honor, is Rule 32(a)(3). And the witnesses that we're talking about here, Your Honor, are also parties to the case, and that's what we believe Rule 32(a)(3) covers.

THE COURT: Okay. Are these witnesses that the defendants will call as well?

MR. HORTON: I believe so, Your Honor, but I --

MR. NELSON: Who is it; is it Cline and

# 1 McNamara? 2 MR. HORTON: Yes, that's correct. 3 MR. NELSON: Yeah, I think it's highly likely we'll call both McNamara and Cline. 4 5 THE COURT: Okay. So if these witnesses are 6 going to be live witnesses, why not just call them as cross 7 in your case-in-chief? 8 MR. HORTON: Rule 32(a)(3), Your Honor, says 9 that we can use the parties' testimony taken by deposition 10 for any purpose; and so that's the purpose we'd like to use it for. 11 12 We also think it would be more efficient and 13 orderly for those pieces of information and authentication 14 of documents to be done by deposition rather than through, for example, cross-examination or calling an adverse witness 15 16 live. 17 THE COURT: Okay. 18 All right. You said you may do it or are you 19 sure you're going to do it? 20 MR. HORTON: I think we're sure we're going to 21 do it, Your Honor. 22 THE COURT: Okay. 23 All right. So, defendants, you wanted some time

to look at the issue further. Let me know your position,

defendants, on it by noon on Friday.

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MR. NELSON: Yes, Your Honor.

One thing that would help us -- and I don't know if you're willing to do this or not -- was to know what portions of the depo designations they intend to play.

Because if it's simply authenticating documents or something like that, you know, that may well be something that we're more likely to agree to than significant portions of depositions that we think might be out of context or whatever.

I don't know if it's something you're willing to do is to tell us what you're going to play in advance so we can have a better feel for whether we're going to object or not.

MR. HORTON: So, Your Honor, we've exchanged deposition designations, as Your Honor probably knows those start out broad and they get narrowed through the process.

We're in the process of narrowing that. I believe under the current pretrial order that we proposed, we would have to provide the actual designations we intend to play by Saturday.

THE COURT: Yes.

MR. HORTON: So that is our plan.

THE COURT: Okay.

All right. And then the defendants will have an opportunity to designate their counter-designations. So it

sounds like by Saturday plaintiffs will let defendants know the specific designations that they proposed to play. Is it video as well?

MR. HORTON: That's correct, Your Honor, yes.

THE COURT: Okay. And then defendants will have the opportunity to counter-designate or raise any objections that you have and if it's -- so why don't we make defendants -- if there's still an issue by Monday morning, you get me your position. And if it's something that I need to resolve, you'll let me know.

MR. NELSON: That sounds good, Your Honor. Thank you.

THE COURT: Okay. And the next topic was going to be deposition designations, so parties are going to continue to meet and narrow your deposition designations and any objections to it.

Any proposed deposition designations that either side intends to present should be presented to the other side in accordance with the instructions of the Court; and, thereafter, the opposing side has the opportunity to make counter-designations.

And if there's still any objections, the parties should bring it to the Court's attention before the day that the counter-designations are proposed to be read into the record.

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Next is just time allocation. It's a three-day bench trial, so basically we're dealing with about 20 hours. Each side will be allocated a total of one hour for opening and closings. Each side will be allocated up to seven-and-a-half hours to present their case or their defense case-in-chief and rebuttal through testimony. seven-and-a-half hours total each side. Sidebar objections will be charged to the parties. With respect to openings and closings, you know, it's a bench trial, you can decide whether or not you want to give an opening or closing, but, you know, we'll just set aside one hour. If you decide that you don't want it and would rather have that time in your presentation of your case, just let me know and we can have that time added to you. But the parties should meet and confer about that and let me know about that prior to the start of trial. MR. NELSON: Your Honor, may I ask a question? THE COURT: Sure. MR. NELSON: I think I know the answer, but when you say one hour for openings and closings, do you mean each or the total? THE COURT: I mean each.

MR. NELSON: So one hour openings and one hour

for closing?

THE COURT: No, one hour per side.

MR. NELSON: Okay.

THE COURT: You can divvy up your hour between opening and closing as you like.

MR. NELSON: All right. Thank you.

THE COURT: All right. Moving to the motions in limine. I've reviewed the motions in limine.

I'll start with plaintiff's motion in limine one, which is motion in limine to preclude defendants from presenting evidence, testimony or argument at trial about any of their patents, patent applications or inventions other than the '433 patent.

That motion in limine is denied. Evidence of Lancium's '632 application and other evidence of Lancium's patent portfolio is relevant to plaintiff's claims and defendant's defenses thereto, and its probative value is not substantially outweighed by the danger of unfair prejudice.

Moving to plaintiff's motion in limine two, which is the motion in limine to preclude defendants from presenting evidence, testimony or argument at trial about any purported conception of any element of the inventions claimed in the '433 patent that defendants withheld during fact discovery.

That motion in limine is denied. Lancium

provided over 30 pages of dates and evidence supporting their claim of conception of the '433 patent. Lancium later provided additional evidence on an element-by-element basis through Dr. Ehsani's expert report. After Lancium supplemented its response to Interrogatory No. 3, BearBox never moved to compel for any alleged deficiency in the response, thus Lancium had reason to believe its response was sufficient. And the *Pennypack* factors favor inclusion of the evidence.

Moving to plaintiff's motion in limine number three, which is motion in limine to preclude defendants from presenting evidence, testimony or argument at trial suggesting that plaintiffs cannot prove inventorship or conversion by relying on nonconfidential information.

That motion in limine is granted in part; denied in part. Lancium is able to present evidence, testimony or argument about the public nature of BearBox's disclosures, which is relevant to Lancium's defense against BearBox's claim of joint inventorship, i.e., to prove there was no collaboration between Lancium, including McNamara and/or Cline and Mr. Storms. However, Lancium cannot make blanket statements that the alleged public nature of BearBox's disclosures precludes a finding of joint inventorship. Such a statement is not supported by the law. See the

Moving to Lancium's first motion in limine,
which is a motion in limine to preclude expert testimony
inconsistent with the Court's claim construction ruling and
to include new expert testimony or opinions outside the
scope of expert's reports.

That motion is granted in part; denied in part.

Defendant's motion in limine number one is granted in part to the extent it seeks to preclude Dr. McClellan from testifying inconsistently with the Court's Markman opinion.

Ultimately, any concern of prejudice can be adequately addressed during trial by proper objection or through cross-examination of Dr. McClellan.

Defendant's motion in limine number one is denied in part as moot based on the Court's November 23rd order striking Dr. McClellan's supplemental report.

Moving to Lancium's motion in limine number two, which is a motion in limine to preclude plaintiffs from using pejorative terms like "thief, theft, steal, stealing or robbery."

Defendant's motion in limine number two is denied as moot. Conversion is no longer a claim to be tried and this is no longer a jury trial.

Moving to Lancium's motion in limine number three, motion in limine to preclude any argument or evidence regarding discovery disputes. The ruling is that neither

side should refer to Lancium's source code or any discovery dispute related to such matter.

At the same time, Lancium cannot not produce such information but try to use such information in its defense.

BearBox cannot refer or attempt to use any discovery the disputes.

That's all the rulings on the motions in limine.

That is all that I had on my list.

Anything else that counsel believes that we need to discuss this afternoon?

One thing I need to raise is set up of electronic equipment. The parties requested that the Court grant them access to the courtroom on Monday, December 5th to allow the parties to set up electronic and computer devices to be used during trial. That's fine. There's nothing on the Court's schedule in this courtroom on that date, so the parties will be granted access to set up their electronic equipment.

Just call chambers and coordinate to make sure the courtroom is open so that you can set up your equipment.

MR. HORTON: Your Honor, one other -- it may be too early to ask, but we wanted to ask about post-trial briefing for conclusions of law and those findings of fact.

We started to discuss this with opposing counsel and we

didn't know whether you would prefer sequential briefing or simultaneous briefing. And I think the one thing we're in agreement on is that we'd like to ask for maybe five to six weeks for the opening briefs to put them a little after the holidays, the next round wouldn't be due until thereafter. We're sort of in agreement on that.

If that's amendable to Your Honor, we can put a proposed schedule, but I think we need your guidance on your preference for -- I think our preference would be sequential briefing, I can't speak -- we didn't reach an agreement on that aspect of anything, but our preference would be that we would file briefs, they would respond and then we would have an opportunity to reply as well as the plaintiffs.

MR. NELSON: And so I guess we are in agreement with the other side with respect to trying to have post-trial briefing done sort of after the holidays. It would be our preference, I think, to have simultaneous briefing or if it is sequential briefing we would get a sur-reply so each side would get the same number of papers.

THE COURT: Okay. I'm fine with the schedule after the holidays.

You guys meet and confer and set a proposed order.

With respect to whether simultaneous or sequential, I think it would be more -- it's more productive

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for the Court to have sequential briefing, but I will grant your request for sur-reply so that each side has the same amount of times to address the Court. MR. NELSON: Thank you, Your Honor. MR. HORTON: Okay. I think with that advice, we can meet and confer and put together a proposal. MR. NELSON: One more pretrial issue, Your Honor. THE COURT: Go ahead. MR. NELSON: How does the Court prefer that we bring up judgment as a matter of law, motion for directed verdict, things like that during the course of once they rest, assuming that we would make such a motion and then again once we rest. THE COURT: Yes. Just make your motion orally and let me know that you're making your motion. I assume that you'll follow up with, you know, written papers. So if I have it then you can make your motion and hand up your written submission. If you're going to do it -- a follow up, you know, after your oral -- at some later date, you know, let me know. It would be our preference MR. NELSON: Okay.

to do it at a later date and make the motions orally at the time just to preserve the record.

THE COURT: Okay. But they should be -- they

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will be due within -- the written submissions will be due within five days after the completion of trial. MR. NELSON: Five days, Your Honor? THE COURT: Yes. Five -- so seven days, yes. So a week after the completion of the trial. MR. NELSON: Thank you, Your Honor. That's fine. THE COURT: Anything else? MR. HORTON: I guess I'll raise it, it is our position that there's no such thing as a motion for a directed verdict or for judgment as a matter of law for a bench trial. I think the rule specifically says with respect to a jury trial, so that would be our position with respect to those motions that they wouldn't be appropriate for a bench trial. THE COURT: Okay. All right. We'll take it under advisement. Ιf that is indeed the law, then it's easy to denial. MR. NELSON: Okay, thank you, Your Honor. THE COURT: Anything else? MR. HORTON: No, Your Honor. All right. THE COURT: MR. NELSON: No, Your Honor. THE COURT: All right. We will recess. We'll look for your proposed orders and we'll

1	see you for trial on Tuesday.
2	(Whereupon, the following proceeding concluded
3	at 3:26 p.m.)
4	I hereby certify the foregoing is a true
5	and accurate transcript from my stenographic notes in the
6	proceeding.
7	/s/ Michele L. Rolfe, RPR, CRR
8	U.S. District Court
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